Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-937

WILLMAR POULTRY COMPANY, PETERSON-BIDDICK COMPANY, and LYNN M. TOMPT, on behalf of themselves and all others similarly situated,

Petitioners,

v.

MORTON-NORWICH PRODUCTS, INC. and RICHARDSON-MERRELL INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT RICHARDSON-MERRELL INC. IN OPPOSITION

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BRIEF FOR RESPONDENT RICHARDSON-MERRELL INC. IN OPPOSITION

The complaint in the present action, filed on June 7, 1974, charged respondents Morton-Norwich Products, Inc. ("Norwich") and Richardson-Merrell Inc. ("Richardson-Merrell") with conspiring to violate Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, in connection with the sale of furazolidone, a broad-spectrum drug particularly useful in treating certain diseases in poultry, which was the subject of a United States patent issued to Norwich

in 1956. Norwich, which in view of its patent was the sole source of supply of furazolidone, supplied furazolidone to Richardson-Merrell pursuant to a distributorship agreement which expired by its terms on December 31, 1969, more than four years before the filing of petitioners' complaint, and which was not renewed, extended, or replaced. In order to avoid the four-year statute of limitations of Section 4B of the Clayton Act, 15 U.S.C. § 15b, petitioners' complaint alleged fraudulent concealment on the part of the respondents.

Respondents moved for summary judgment striking the claim of fraudulent concealment, dismissing all claims against Norwich accruing before June 7, 1970, and dismissing the complaint against Richardson-Merrell. Respondents' moving affidavits established that the matters complained of by petitioners were set forth in a public report issued by the United States Tariff Commission on November 13, 1969, and were actually known to at least two of the three petitioners even before that date. The record further established that Richardson-Merrell's sole source of supply of furazolidone was the distributorship agreement with Norwich, which was terminated on December 31, 1969, and that Richardson-Merrell made no sales of furazolidone to any of the three petitioners after December 2, 1969.

Petitioners' responding affidavits did not attempt to deny or qualify any of these facts. Instead, the three petitioners submitted identical pro forma affidavits, averring in conclusory terms that they could not present by affidavit any facts in opposition to respondents' motions because knowledge of the facts was allegedly "exclusively with

and/or largely under the control of the conspiratorial defendants."

The United States District Court for the District of Minnesota, Fourth Division, Honorable Earl R. Larson, U.S.D.J., held that respondents' motion for summary judgment should be granted in light of the uncontroverted facts established by respondents' moving affidavits. Judge Larson's holding was unanimously affirmed by the United States Court of Appeals for the Eighth Circuit, in an opinion written by Circuit Judge Bright and joined by Senior Circuit Judge Jones (of the Fifth Circuit, sitting by designation) and Circuit Judge Heaney.

Petitioners' petition for certiorari argues that this Court's decision in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), prohibits the granting of a motion for summary judgment prior to discovery in an antitrust case, even where, as in the present case, the motion is based upon uncontroverted facts relating only to the timeliness of the action, and further contends that petitioners' conclusory affidavits alleging that unspecified facts were "exclusively" or "largely" in the possession of the respondents should have been accepted as sufficient to avert summary judgment under Rule 56(f) of the Federal Rules of Civil Procedure. For the reasons given below, Richardson-Merrell submits that the District Court and the Court of Appeals rightly rejected these contentions, and correctly concluded that the record before the District Court in the present case justified the granting of respondents' motions for summary judgment.

Questions Presented

1. Where the facts supporting motions by defendants for summary judgment on the ground of the statute of limitations in an antitrust case are not denied or qualified by plaintiffs, and where plaintiffs rest solely upon pro forma conclusory affidavits alleging that unspecified facts are "exclusively" or "largely" in the possession of the defendants, is the granting of the motions prohibited either by *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), or by Rule 56(f) of the Federal Rules of Civil Procedure?

2. On the record in the present case, was summary judgment correctly granted by the District Court and sustained by the Court of Appeals?

Statement of the Case

1. The Allegations of Petitioners' Complaint

Petitioners' complaint, filed on June 7, 1974, alleged in Count One that Norwich and Richardson-Merrell conspired in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, to exclude from the United States furazolidone manufactured and sold outside the United States by, among others, a Canadian subsidiary of Norwich ("Canadian Norwich") (A351*). The complaint alleged that pursuant to this asserted conspiracy Norwich and Richardson-Merrell

* "A" citations are to the Appendix in the United States Court of Appeals for the Eighth Circuit. "Pet." and "Pet. App." citations are to the petition for certiorari and the appendix thereto.

"(a) caused the Customs Bureau and the President to prevent the importing of furazolidone manufactured and sold by Canadian Norwich and others into the United States;

(b) refused and withheld its consent to all such importation;

(c) made repetitive use of litigation which was timed and designed principally to preclude importation into the United States of competitive furazolidone manufactured by Canadian Norwich, among others, and thereby to preserve defendants' monopoly;

(d) entered into agreements dividing markets by classes of customers;

(e) imposed tying of sale of other products to furazolidone." (A351-A352.)

Count Two of the complaint realleged the conspiracy alleged in Count One, and further alleged that the Norwich patent on furazolidone was void and unenforceable and had been misused (A354-A357).

In an attempt to avoid the four-year statute of limitations, petitioners inserted into their complaint a paragraph headed "Fraudulent Concealment" (A353). This paragraph alleged in conclusory terms that petitioners had not discovered the alleged conspiracy until "within the last four years" and could not by the exercise of due diligence have discovered it earlier, and further alleged that respondents "did not disclose that Norwich, as alleged herein, manufactured furazolidone in Canada and successfully prevented its importation into the United States" (*ibid.*).

2. The Facts Underlying Respondents' Motions for Summary Judgment

The facts submitted to the District Court in support of respondents' motions for summary judgment established, contrary to petitioners' allegation of fraudulent concealment, that the matters upon which petitioners' complaint was based were public knowledge well before June 7, 1970, the beginning of the four-year statute of limitations period. Specifically, the record showed that the matters complained of were set forth in a public report issued by the United States Tariff Commission on November 13, 1969, and were actually known to at least two of the three petitioners even before that date. The record before the District Court also established that the distributorship agreement between Norwich and Richardson-Merrell, which was Richardson-Merrell's sole source of furazolidone, was terminated on December 31, 1969, and that Richardson-Merrell's last sale of furazolidone to any of the three petitioners took place on December 2, 1969, more than four years before the complaint was filed on June 7, 1974. All of these facts were and are completely uncontroverted by petitioners.

The record established that beginning in the early 1960's Norwich's United States patent on furazolidone was infringed by the importation of furazolidone from Canada and other foreign countries, often by clandestine and fraudulent means (A275-A279, A300-A305). In an effort to terminate such infringement of its patent, Norwich brought 56 patent infringement suits during the period from 1963 to 1969, almost all of which resulted in injunctions against further infringement, and none of which impugned the validity of Norwich's furazolidone patent

(A136, A146-A153). The defendant in one of these infringement suits, which was terminated by a consent injunction on April 14, 1967, was Peterson-Biddick Company, one of the three plaintiffs in the present action, which had purchased infringing furazolidone from Canada (A149, A337-A342, A359-A361).

On March 19, 1968 Norwich filed a complaint with the United States Tariff Commission, alleging that the infringing importation of furazolidone constituted an unfair method of competition, and requesting the Tariff Commission to recommend the issuance of a Presidential order barring further imports of furazolidone during the term of Norwich's patent, pursuant to Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 (A137, A404-A429). On August 28, 1968, after receiving the preliminary report of the Tariff Commission (A158-A204), President Johnson issued an exclusion order barring further imports of furazolidone (A157, A205). This exclusion order remained in effect until April 17, 1973, when the Norwich patent expired (A439).

During 1968 and 1969 the Tariff Commission conducted a public hearing on furazolidone, and its attention was specifically drawn to the possible antitrust implications of the distributorship agreement between Norwich and Richardson-Merrell (A138-A139, A309-A318). By a letter dated April 15, 1969 (A312-A313), the Antitrust Division of the United States Department of Justice advised the Tariff Commission that in its view certain provisions of the distributorship agreement between Norwich and Richardson-Merrell contravened the antitrust laws. The Antitrust Division stated that it did not intend to bring

suit against Norwich or Richardson-Merrell, in light of the impending termination of the distributorship agreement on December 31, 1969, but urged the Tariff Commission to recommend denial of any relief under the Tariff Act (A313).

In its final report to the President (A215-A305), which was made public on November 13, 1969, the Tariff Commission recommended the continuation of the Presidential exclusion order. The Tariff Commission annexed to its report a copy of the Antitrust Division's letter stating that certain provisions of the distributorship agreement between Norwich and Richardson-Merrell violated the antitrust laws (A298-A299), but after thorough consideration of the antitrust issues the Tariff Commission concluded that there had been no violation of the antitrust laws (A231-A237, A274). Copies of the Tariff Commission's final report were sent to numerous interested persons, specifically including Peterson-Biddick Company, one of the three plaintiffs in the present action (A93, A96). The proceeding before the Tariff Commission and its final report were the subject of extensive publicity in general and trade publications (A307-A308, A319-A327).

All of the matters complained of in petitioners' complaint, as quoted on page 5 above, were set forth in the Tariff Commission report, which was issued well before the commencement of the four-year statute of limitations period on June 7, 1970. In particular, the fact that furazolidone was manufactured and sold in Canada by Canadian Norwich, which the complaint claimed had been concealed from the public (*see* p. 5 *supra*), was specifically

stated in the Tariff Commission report (A282).* This fact was already known to Peterson-Biddick Company and Willmar Poultry Company, two of the three plaintiffs in the present action, as a result of their importation of infringing furazolidone from Canada in 1967 and 1969, respectively (A333-A342).

The record before the District Court further established, again without contradiction, that Richardson-Merrell's sole source of supply of furazolidone was its distributorship agreement with Norwich (A106). This distributorship agreement expired by its terms on December 31, 1969 (A107-A108, A120-A121). It was not renewed, extended, or replaced (A108). Although Richardson-Merrell used up the inventory of furazolidone which it had on December 31, 1969 by making sales after that date, Richardson-Merrell received no further supplies of the product after that date, and Norwich sold furazolidone products to former customers of Richardson-Merrell, including the plaintiffs in the present action (*see* A70, A106-A108). Richardson-Merrell's last sales of furazolidone to Willmar Poultry Company and Peterson-Biddick Company, two of the three plaintiffs in this case, took place on November 14, 1969 and December 2, 1969, respectively (A107, A127-A128). The third plaintiff, Lynn M. Tompt, never purchased furazolidone from Richardson-Merrell (A107).

3. The District Court's Decision Granting Respondents' Motions for Summary Judgment

The facts placed before the District Court on respond-

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* The fact that furazolidone was made and sold in Canada by Canadian Norwich was also stated by Norwich's counsel during the public hearing before the Tariff Commission (A212-A214).

ents' motions for summary judgment, as summarized above, demonstrated that the matters set forth in petitioners' complaint were known to the public generally, and to at least two of the three plaintiffs in this case in particular, well before the commencement of the four-year statute of limitations period on June 7, 1970. The facts before the District Court further established that the distributorship agreement between Norwich and Richardson-Merrell, which was Richardson-Merrell's sole source of furazolidone, was terminated on December 31, 1969, and was not renewed, extended, or replaced. On the basis of these facts, respondents moved for summary judgment striking the claim of fraudulent concealment, dismissing all claims against Norwich accruing before June 7, 1970, and dismissing the complaint against Richardson-Merrell.

Petitioners' responding affidavits, which were sworn to more than a month and a half after the service and filing of respondents' motions for summary judgment,* did not attempt to deny or qualify any of the facts set forth in respondents' moving affidavits. Instead, the three petitioners submitted identical affidavits, aptly described in petitioners' own brief on appeal (p. 19) as "pro forma Rule 56(f) affidavits", each of which simply averred that "[a]t this time, plaintiff cannot present by affidavit facts essential to justify opposition to the motions of the defendants" because "[k]nowledge of such facts is exclusively with and/or largely under the control of the conspiratorial defendants" (A431, A433, A435).

* Respondents' motions for summary judgment were served and filed on July 25, 1974 (A60-A92). Petitioners' responding affidavits were sworn to on September 12, 13, and 16, 1974 (A432, A434, A436).

None of petitioners' affidavits made any attempt to specify the nature of the facts petitioners hoped to find through discovery. None of the affidavits made any reference to the facts stated in respondents' motions for summary judgment which were obviously within petitioners' own knowledge, such as petitioners' awareness before June 7, 1970 of the matters which their complaint alleged had been fraudulently concealed from them until after that date, and the cessation of petitioners' purchases of furazolidone from Richardson-Merrell before December 31, 1969.

In a decision rendered on October 1, 1974 (Pet. App. A-20-A-27), the District Court, Honorable Earl R. Larson, U.S.D.J., granted respondents' motions for summary judgment. Judge Larson found that petitioners' claim of fraudulent concealment was refuted by the record of the proceeding before the United States Tariff Commission in 1968 and 1969 (Pet. App. A-22-A-24). He held that the record also rebutted two additional theories for tolling the statute of limitations, which were advanced for the first time by counsel for petitioners at the oral argument of the motion for summary judgment and which petitioners have now abandoned (Pet. App. A-24-A-26). Finally, Judge Larson held that Richardson-Merrell was entitled to summary judgment dismissing the complaint against it (Pet. App. A-26-A-27).

Petitioners moved for reargument or, in the alternative, for certification pursuant to 28 U.S.C. § 1292(b) (A386-A430). At the oral argument of the motion for reargument, petitioners' counsel argued for the first time that Richardson-Merrell might conceivably have engaged in communications with Norwich regarding importations of furazolidone in violation of the Presidential exclusion order—which peti-

tioners' counsel termed the "border watch"—at some time subsequent to the termination of the distributorship agreement between Norwich and Richardson-Merrell on December 31, 1969 (A51).* The District Court denied petitioners' motion for reargument, and granted certification pursuant to 28 U.S.C. § 1292(b), which was not opposed by respondents (A58).

4. The Decision of the Court of Appeals

The United States Court of Appeals for the Eighth Circuit unanimously affirmed Judge Larson's decision on July 17, 1975, in an opinion written by Circuit Judge Bright and joined by Senior Circuit Judge Jones (of the Fifth Circuit, sitting by designation) and Circuit Judge Heaney (Pet. App. A-1-A-16).

The Court of Appeals, while recognizing that "summary judgment should be invoked sparingly in antitrust litigation", rejected petitioners' contention "that summary judgment is never appropriate in advance of discovery in an antitrust case" (Pet. App. A-16). The Court of Appeals held, citing authorities, that summary judgment may be granted in advance of discovery where, as in the present case, the ground for summary judgment is the statute of limitations (Pet. App. A-6). After reviewing the record

* Petitioners attempt to give the impression that this argument had previously been raised at the oral argument of the motion for summary judgment (Pet. 8). In fact, petitioners' counsel had used the term "border watch" at the oral argument of the motion for summary judgment (A30), but had not argued that any such "border watch" took place after December 31, 1969, when the distributorship agreement was terminated. The Court of Appeals correctly found that "[t]he plaintiffs failed to raise this issue, which is not disclosed by the pleadings, in opposition to the defendants' motions for summary judgment" (Pet. App. A-13).

before the District Court, the Court of Appeals held that summary judgment was proper on the statute of limitations issue because there was no genuine issue of material fact (Pet. App. A-9-A-12).

The Court of Appeals also affirmed the District Court's grant of summary judgment dismissing the complaint against Richardson-Merrell (Pet. App. A-12-A-14). The Court of Appeals held that petitioners' "pro forma affidavits under Rule 56(f)" failed to comply with the letter or the spirit of Rule 56(f) of the Federal Rules of Civil Procedure, and were insufficient to raise any issue of fact with respect to Richardson-Merrell (Pet. App. A-13, A-14-A-16). In the alternative, the Court of Appeals held that, even if petitioners' belated and speculative contention that Richardson-Merrell joined Norwich in a "border watch" after December 31, 1969 was properly before the Court, the three items of evidence cited by petitioners in support of this contention all related to the period before the termination of the distributorship agreement between Norwich and Richardson-Merrell on December 31, 1969, and therefore "do not constitute any evidence to support the proposition that Richardson conspired with Norwich within four years of June 7, 1974, the date of filing of the complaint" (Pet. App. A-13-A-14).*

* The Court of Appeals also stated that "Richardson had not made any sales of furazolidone to anyone after December 31, 1969" (Pet. App. A-5) and that "Richardson's interest in furazolidone, not to mention its participation in its distribution, terminated prior to the limitations period" (Pet. App. A-14). The record establishes that Richardson-Merrell made no sales to any of the petitioners after December 2, 1969, as the District Court found (Pet. App. A-26-A-27), although Richardson-Merrell did use up the inventory of furazolidone which it had on December 31, 1969 by making sales after that date (*see* p. 9 *supra*). The fact that Richardson-Merrell

Petitioners sought rehearing en banc, which was denied on August 7, 1975 (Pet. App. A-17).*

Reasons for Denying the Writ

1. The Court of Appeals Applied the Correct Standards for Granting Summary Judgment

In Question 1 and Points I and II of the petition for certiorari (Pet. 3, 7-12), petitioners argue that under this Court's decision in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), summary judgment may not be granted prior to discovery in an antitrust case. This argument paints with much too broad a brush.

As the Court of Appeals expressly recognized (Pet. App. A-5-A6, A-16), this Court held in *Poller* that summary judgment should be sparingly used in antitrust cases where issues of motive and intent are of importance. 368 U.S. at 473. The Court of Appeals rightly held, however, that this does not mean that summary judgment may not be granted in an antitrust case, without requiring the parties to undergo lengthy and fruitless discovery, where the uncontroverted facts establish that the action is barred by the statute of limitations (Pet. App. A-6).

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used up the inventory of furazolidone which it had on December 31, 1969 by making sales of furazolidone in competition with Norwich in no way affects the correctness of the basic conclusion of the Court of Appeals that the record established that the relationship between Norwich and Richardson-Merrell ended with the termination of the distributorship agreement between them on December 31, 1969 (Pet. App. A-13-A-14).

* Within a week after the denial of rehearing en banc by the Court of Appeals, petitioners filed a second action against Richardson-Merrell. In a decision filed on December 22, 1975 (Pet. 21-26), the District Court dismissed this action on the ground of *res judicata*. Petitioners have filed a notice of appeal from this decision to the United States Court of Appeals for the Eighth Circuit.

This Court has historically emphasized that the statute of limitations is a statute of repose which serves an important public interest.* Both before and after this Court's decision in *Poller*, the Federal courts have held that summary judgment may properly be granted in an antitrust case, even before discovery, where the facts establish the applicability of the statute of limitations.** Petitioners cite no contrary decisions, and respondents know of none. Accordingly, petitioners' argument that the Court of Appeals in the present case violated the teaching of *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), is without substance.

In Question 3 and Point IV of their petition (Pet. 3, 15-17), petitioners argue that the holding of the Court of Appeals with respect to Rule 56(f) of the Federal Rules of Civil Procedure imposed a "Catch 22" upon petitioners (Pet. 3, 15). This argument represents an unfair caricature of the holding of the Court of Appeals, which was fully in accord with both the letter and the spirit of Rule 56(f).

Rule 56(f) of the Federal Rules of Civil Procedure pro-

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* *E.g., Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938), and cases cited; *United States* v. *Oregon Lumber Co.*, 260 U.S. 290, 299-300 (1922), and cases cited; *Wood* v. *Carpenter*, 101 U.S. (11 Otto) 135, 139 (1879).

** *See, e.g., Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 523 F.2d 389, 393-94 (6th Cir. 1975); *Akron Presform Mold Co.* v. *McNeil Corp.*, 496 F.2d 230, 233-35 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974); *Suckow Borax Mines Consolidated, Inc.* v. *Borax Consolidated, Ltd.*, 185 F.2d 196, 206-09 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951); *Philco Corp.* v. *RCA*, 186 F. Supp. 155, 158-61 (E.D. Pa. 1960); *cf., e.g., Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F.2d 80, 86-88 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961). The courts have followed a similar rule in cases under the Federal securities laws. *See, e.g., Hupp* v. *Gray*, 500 F.2d 993, 996-97 (7th Cir. 1974).

vides that, "[s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition," the court may defer determination of the motion for summary judgment in order to afford an opportunity for discovery. It is well established, as the Court of Appeals held in the present case (Pet. App. A-8), that Rule 56(f) requires a specific and concrete statement of the nature of the facts as to which discovery is alleged to be required, and that "[t]he mere averment of exclusive knowledge or control of the facts by the moving party is not adequate".* Any other rule would permit a party to use boilerplate, pro forma affidavits pursuant to Rule 56(f) as a means of staving off a well founded summary judgment motion, in violation of the fundamental purpose of Rule 56 to pierce the pleadings and determine whether there are in fact genuine issues of material fact.**

This is exactly what petitioners tried to do here. In the face of the facts established by respondents' moving affidavits—many of which, such as the extent of petitioners' purchases from Richardson-Merrell and their prior knowledge of the matters alleged in their complaint, were pecu-

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* 6 J. W. Moore, Federal Practice ¶ 56.24, at 2876 (2d ed. J. W. Moore & J. D. Lucas 1975); *accord, e.g., Robin Construction Co.* v. *United States*, 345 F.2d 610, 613-14 (3d Cir. 1965); *School Board of Okaloosa County* v. *Richardson*, 332 F. Supp. 1263, 1268-69 (N.D. Fla. 1971).

** As this Court stated in *First Nat'l Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289 (1968), which was also an antitrust case, "[w]hat Rule 56(e) does make clear is that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him." (Footnote omitted.)

liarly within petitioners' knowledge—the petitioners, in the words of the Court of Appeals, "stood by silently and submitted pro forma affidavits under Rule 56(f)" (Pet. App. A-13). To condone such tactics would be to permit litigants to play games with the Federal courts. The Court of Appeals rightly held that petitioners had failed to comply with the requirements of Rule 56(f).

2. Summary Judgment Was Correctly Granted on the Record in the Present Case

In Question 2 and Points I and III of the petition for certiorari (Pet. 3, 7-10, 13-14), petitioners contend that the courts below were wrong in granting summary judgment on the record in the present case. This contention is without merit.

In the first place, summary judgment was correctly granted on the issue of fraudulent concealment.* In order to prevail on the issue of fraudulent concealment, petitioners would have been required to show (1) that they had no knowledge of facts putting them on notice of their present claims, (2) that they could not have become aware of such facts through the exercise of due diligence, and (3) that affirmative acts of concealment were committed by respondents.** In the present case the courts below correctly held

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* Indeed, petitioners do not even mention their claim of fraudulent concealment in their Questions Presented (Pet. 3) or in the Argument section of their petition (Pet. 7-17), so that the correctness of the dismissal of this claim by the courts below is not an issue before this Court.

** *See, e.g., Holmberg* v. *Armbrecht*, 327 U.S. 392, 396-97 (1946); *Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 523 F.2d 389, 393-94 (6th Cir. 1975); *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 461 (2d Cir. 1974).

that in light of the Tariff Commission's report dated November 13, 1969, to say nothing of the facts known directly to petitioners Willmar Poultry Company and Peterson-Biddick Company, the petitioners could not possibly establish that they did not know and in the exercise of due diligence could not have known of the matters alleged in the complaint until after June 7, 1970 (Pet. App. A-9-A-12, A-22-A-24). It follows that summary judgment was properly granted on the issue of fraudulent concealment. The Federal courts have held that it is proper to grant summary judgment striking a claim of fraudulent concealment where the matters allegedly concealed are shown to have become public knowledge before the beginning of the statutory period.*

Petitioners argue that summary judgment should not have been granted dismissing the complaint against Richardson-Merrell. This argument ignores the uncontroverted evidence in the record that Richardson-Merrell lost its sole source of supply of furazolidone when the distributorship agreement between Norwich and Richardson-Merrell was terminated on December 31, 1969, and made no sales of furazolidone to any of the three petitioners after December 2, 1969 (*see* p. 9 *supra*). Petitioners' belated speculation that Richardson-Merrell might possibly have maintained some kind of "border watch" for Norwich after December 31, 1969, as the Court of Appeals correctly held (Pet. App. A-13-A-14), disregards the fact that the dis-

* *See, e.g., Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 523 F.2d 389, 393-94 (6th Cir. 1975); *Japanese War Notes Claimants Ass'n* v. *United States*, 373 F.2d 356, 359-60 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967); *Gaetzi* v. *Carling Brewing Co.*, 205 F. Supp. 615, 623 (E.D. Mich. 1962).

tributorship agreement between Norwich and Richardson-Merrell, which was the sole basis for the relationship between Norwich and Richardson-Merrell, terminated on December 31, 1969 (*see* pp. 13-14 *supra*).* Moreover, the importation of furazolidone was in any event prohibited during this period by the Presidential exclusion order (*see* p. 7 *supra*). Finally, as the Court of Appeals also held (Pet. App. A-13), the alleged "border watch" issue was an afterthought which was never properly and timely presented by petitioners to the District Court (*see* pp. 11-12 *supra*). For all these reasons, petitioners' contention that summary judgment was improper on the record in the present case is without substance.

* Significantly, the Antitrust Division of the United States Department of Justice determined not to bring suit against Norwich or Richardson-Merrell because of the imminent termination of the distributorship agreement on December 31, 1969 (*see* pp. 7-8 *supra*). In light of the fact that the agreement between Norwich and Richardson-Merrell terminated by its express terms on December 31, 1969, petitioners' reliance upon *Hyde* v. *United States*, 225 U.S. 347 (1912) (Pet. 3, 13-14), is misplaced.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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